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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1674

SANTA ROSA BAND OF INDIANS, *et al.*,
Plaintiffs and Respondents,

VS.

KINGS COUNTY, *et al.*,
Defendants and Petitioners.

**Petitioner's Response to Memorandum for the
United States as Amicus Curiae**

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INTRODUCTION

We file this response to the Solicitor General's Memorandum for the United States as Amicus Curiae (hereinafter "Solicitor General's Memorandum"), opposing certiorari. The Solicitor General's Memorandum was submitted pursuant to the Court's invitation of October 4, 1975.

ARGUMENT

The Solicitor General would simply brush under the rug the official report of the Department of the Interior on the PL 280 legislation, a report appended to our supplemental brief. This report has never been previously called to this

Court's attention. Indeed, the report lay undiscovered for twenty-three years in the files of the House Committee on Interior and Insular Affairs, until unearthed by the petitioner in its research following this Court's opinion in *Bryan v. Itasca County*, No. 75-5027, decided June 14, 1976.

As the Court observed in the *Bryan* decision, *supra*, slip op., 9 n. 9, the only legislative history brought to the Court's attention was an unpublished transcript of congressional hearings. This transcript was originally produced by the Solicitor General in his brief in *Tonasket v. Washington*, 411 U.S. 451 (1973), which, like *Bryan*, was a tax case.

The apparent lack of legislative history also heavily influenced a law review article cited with approval in the *Bryan* decision, *supra*, slip op., 10 n. 10. See Israel & Smithson, "Indian Taxation, Tribal Sovereignty and Tribal Development," 49 N.D.L.Rev. 267, 292 n. 96.a (1973). The authors were aware only of the materials that had been produced by the Solicitor General in the *Tonasket* case. *Ibid.*

The parties in the *Bryan* case, as well as the United States as amicus, also cited no legislative history in their briefs to the Court, other than the transcript produced by the Solicitor General in the *Tonasket* case.

Thus, no one involved in the *Bryan* case was aware of the newly-discovered report of the Department of the Interior, not the Court, the parties, the United States or the commentators. The existence of this report was apparently overlooked by the Solicitor General in his research into the legislative history files on PL 280. It is perhaps understandable that the Solicitor General now seeks to downplay the significance of the report, for it is at odds with the theory that PL 280 fails to give the states civil

regulatory authority over Indian reservations, a theory of which the Solicitor General has been a leading exponent.¹

Further, the Solicitor General's sketchy treatment of the report of the Department of the Interior is far from persuasive. First, the Solicitor General argues that the report "scarcely demonstrates what Congress intended." Solicitor General Memorandum, 7. However, since Congress adopted the very language that was submitted by the Secretary in his report, the report is at least as relevant an indication of the congressional mind as the hearing transcript which the Solicitor General produced in the *Tonasket* and *Bryan* cases, and on which the Court relied so heavily in the latter case.²

Second, the Solicitor General argues that the Secretary, in his report, meant only to refer to state decisional law, not to other types of state laws. Solicitor General's Memorandum, 7. However, no such distinction appears in the report. Also, the Solicitor General's argument is inconsistent with the legislative history of similar legislation applicable to the Agua Caliente reservation, 63 Stat. 704 (1949), discussed at pages 7-8 of our supplemental brief. The Solicitor General's argument is also inconsistent with the legislative history of the subsequent Arizona Leasing Act, 25 U.S.C. §§ 416-416j, discussed at page 10 of our supplemental brief. The Solicitor General fails to respond to

1. See, e.g., Memorandum for the United States as Amicus Curiae in *Bryan v. Itasca County*, No. 75-5027, October Term, 1975, at 10.

2. We do not want to be misunderstood as suggesting that the hearing transcript is not relevant. Nor do we want to be misunderstood as suggesting that we believe that the newly-discovered report of the Department of the Interior would compel a different result from that reached in the *Bryan* decision. To the contrary, we stated at page 2 of our supplemental brief that the *Bryan* decision is fully sustainable without venturing into the thicket of state civil regulatory jurisdiction.

our analysis of the legislative history applicable to either of the latter acts.

Finally, even if the *Bryan* analysis is correct, it does not apply in the pending case, or in most other cases involving the applicability of local zoning ordinances in California. In *Bryan*, the Court concluded that, on the basis of a lack of legislative history, PL 280 does not authorize state or local agencies to apply their *civil* regulatory laws on Indian reservations. The Court specifically noted, however, that state *criminal* laws are applicable on Indian reservations under that law. Slip op., 6. In fact, most local agencies in California have provisions in their zoning ordinances that make it a misdemeanor for a person to violate the zoning ordinances; such a provision is found, in fact, in the zoning ordinances of Kings County in this case.³ Thus, the plaintiffs, in violating Kings County's zoning ordinances, are in violation of the county's criminal ordinances, not its civil ordinances. The *Bryan* analysis, even if correct, is thus inapplicable here.

Indeed, the *Bryan* analysis raises larger questions concerning the extent of state and local regulatory control over Indian reservations. Specifically, does a state law, regulating conduct that is not conventionally criminal in nature, become criminal for purposes of the *Bryan* analysis if criminal sanctions are imposed on those who engage in the conduct? If so, what is to prevent state or local agencies from overcoming the effect of the *Bryan* decision by simply

3. Section 2403 of the Zoning Ordinance of Kings County, adopted April 7, 1964, makes it a misdemeanor for any person to violate the county's zoning ordinances, and provides that any person who violates the ordinances shall be subject to a fine not to exceed \$500 or imprisonment for a period not to exceed six months, or both.

imposing criminal sanctions against those who violate state or local laws that are otherwise civil in nature? These questions were raised at page 13 of our supplemental brief, but the Solicitor General failed to respond to them. These questions will surely haunt state and local agencies that are called on to apply the *Bryan* decision, and thus should be resolved by this Court, even if it believes that the *Bryan* analysis is correct.

CONCLUSION

To the extent that the Court in the *Bryan* case examined PL 280 in a non-tax context, its analysis was *dictum*. The Court now has before it, for the first time, a case that squarely presents the scope of state regulatory jurisdiction over Indian reservations under PL 280. The Court also has before it, for the first time, materials that bear upon the legislative history of that act, materials that have not been previously examined by the courts. In the end, the Court may or may not share our view of the meaning and weight to be ascribed to these newly-discovered materials. It is submitted, however, that the question is of sufficient importance to be determined after opportunity for full briefing and argument, rather than within the constructed limits afforded a petition for certiorari.

The issue presented by the Court's analysis of the *Bryan* decision was not presented to the court below. The lower court reached its result by an analysis of other issues, an analysis which we believe to be erroneous. Those other issues are also worthy of consideration by this Court. for,

although they have been considered by many lower federal courts, they have yet to be considered by this Court.

Respectfully submitted,

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